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In the

Supreme Court of the United States

OCTOBER TERM, 1944

No. 49 21

THOMAS MARTINO,
Petitioner,
vs.
MICHIGAN WINDOW CLEANING COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI

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May It Please The Court:

Thomas Martino, for himself and for other persons similarly situated, respectfully petitions that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered in this case October 18, 1944. This petition is submitted without a separate brief and necessarily analyses opinions of the courts of the various circuits and of this Court, in view of the fact that the conflict of opinions constitutes an essential basis for the granting of certiorari in this case.

OPINIONS BELOW

The judgment and findings of fact in the district court, 51 F. Supp. 505, are printed at R. 20 through R. 25. The judgment of the Circuit Court of Appeals is printed at R. 33.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 18, 1944 (R. 33). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether employes who spend the greater part of their time washing windows in buildings in which goods are produced for interstate commerce are "engaged in the production of goods for commerce" within the meaning of the Fair Labor Standards Act.

2. Whether employes of a window cleaning concern, who spend the greater part of their time cleaning windows for customers of their employer in buildings in which goods are produced for interstate commerce are "engaged in a retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce" and are therefore exempt from the wage and hour provisions of the Fair Labor Standards Act.

3. Whether summary judgment was improperly granted by the court on the court's own motion.

STATUTE INVOLVED

The statute involved is the Fair Labor Standards Act, 52 Stat. 1060, 29 U. S. C., Sec. 201 *et seq.* Section 13 (a) (2), the interpretation of which is involved in this case, provides:

> "Sec. 13 (a) The provisions of Section 6 and 7 shall not apply with respect to * * * (2) any employe engaged in any retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce."

Also here involved is the statutory definition of "produced":

> "Sec. 3. As used in this Act * * *.
>
> (j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employe shall be deemed to have been engaged in the production of goods if such employe was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary thereof, in any State."

STATEMENT

All the material facts are stipulated (R. 10 and R. 18). Petitioner brought suit for himself, 23 other named employes, and all other persons similarly situated, under Sec. 16 (b) of the Act, for overtime wages, liquidated damages, attorney fees, and costs on the basis of the following undisputed facts:

Respondent owns and operates a large window cleaning business. The greater part of the work is rendered for huge manufacturing and industrial plants, such as various units of General Motors Corporation. Under respondent's direction petitioners are assigned to such factories in which they are engaged in window cleaning, thereby not only keeping the factory clean to that event, but also facilitating the flow of natural light to the machines and assembly lines at which the factory's employes are at work.

The answer denied that the washing of factory windows is necessary to the production of goods for interstate commerce which takes place inside the factory. The petitioners would have presented an abundance of proof of this contention had not the district court dismissed the complaint on its own motion, without giving the plaintiffs an opportunity to present testimony. The trial court and the circuit court of appeals indicated that judicial notice would be taken that window cleaning is obviously necessary.

On November 23, 1942, the litigants entered into a stipulation of facts (R. 10) which showed that more than a substantial part of the work done by petitioners was on buildings in which goods were produced for interstate commerce. The district judge denied petitioner's motion for summary judgment, held that respondent was a service establishment and that

> "* * * under the decisions it would be our duty to so correct the status as to provide time and one-half for overtime in the event plaintiff is able to show that defendant is engaged for the greater part in furnishing its service to firms engaged in interstate commerce or in the production of goods for interstate commerce" (R. 18).

Thereupon an additional stipulation of facts was filed on May 6, 1943, which stated (R. 19):

> "A. As a matter of fact, during the period here involved, the greater portion of the work done by defendant corporation and by parties plaintiff under direction of defendant corporation, was for customers who were engaged in interstate commerce and most of whose employes were engaged in interstate commerce.
>
> "B. As a matter of fact, during the period here involved, the greater portion of the work done by defendant corporation and by parties plaintiff under direction of defendant corporation, was for customers who were engaged in the production of goods for interstate commerce, and most of whose employes were engaged in the production of goods for interstate commerce or in occupations necessary to the production of goods for interstate commerce."

Hence, the question raised by the district judge was specifically and affirmatively answer by stipulation of the parties. The court thereupon directed petitioners to renew their motion for summary judgment and thereafter rendered its opinion (R. 20) in which it held this time that since respondent is a "service establishment" it is of no consequence that the greater part of its servicing is rendered to customers engaged in the production of goods for commence; that to lose the exemption the service establishment would have to "send its men out of the state to serve customers."

If the district court had permitted testimony to be taken, rather than to dismiss the complaint on its own motion, petitioners would not have been denied the opportunity to directly establish the close and intimate tie between window cleaning and the production that takes place within the factories whose windows are cleaned. It

would have been shown that a vast business enterprise is here involved whose implications are direct to the intricate interstate network of the automobile manufacturing industry. The proofs would have shown that petitioners hardly ever see respondent's place of business: that they work in the factories, and indeed must comply with the self-same requirements of citizenship as the factory employes in order to gain admission to do their work and that they must be identified by the same type of identifying factory badge in order to get past the entrance gate. The proofs would have shown that respondent's customers have always deducted the cost of window cleaning from their respective gross incomes, for income tax purposes, as "ordinary and necessary expenses" under Sec. 23 (a) of the Internal Revenue Code. We would have shown that the cost of window washing is not absorbed by respondent's customers but has always been passed on as part of the price of their respective products. Moreover, the proofs would have shown that window cleaning has a direct and immediate relationship to safety and efficient workmanship on the part of the factory employes who work in the light of the windows that petitioners clean.

The Circuit Court of Appeals affirmed the dismissal of the complaint holding that (1) petitioners were not engaged in the production of goods for commerce because "it is impossible for us to entertain the concept that window cleaning becomes interstate commerce, or is in pursuance of the production of goods for commerce, by the fact that the windows cleaned are in the manufacturing establishments of industries engaged in interstate commerce" and (2) in any event, plaintiffs were within the 13 (a) (2) exemption.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

1. The decision of the District Court and of the Circuit Court of Appeals in the present case are in disregard of the decisions of this Court in *Kirschbaum v. Walling*, 316 U. S. 517, and in other cases.

2. The decisions of the lower courts in the present case are directly in conflict with those in other circuits.

3. The position taken in the present case is clearly erroneous. It disregards not only the opinions of this Court and of the other Circuit Courts of Appeal, but also the correct constructions given to them.

4. In view of the issues and of the stipulated facts in the present case, there was error in granting summary judgment for the defendant.

ARGUMENT

I.

THE DECISIONS OF THE COURTS BELOW ARE IN DISREGARD OP DECISIONS OF THIS COURT

This Court has repeatedly held that an employe engaged in an occupation necessary to the production of goods for commerce is entitled to the benefits of the Act regardless of the character of his employer's business. *Kirschbaum v. Walling* and *Arsenal Bldg. Corp. v. Walling*, 316 U. S. 517; *Warren Bradshaw Drilling Co. v. Hall*, 317 U. S. 88. In *Overstreet v. North Shore R. R.*, 318 U. S. 125, this Court became emphatic on this point, holding

> "The nature of the employer's activities is not determinative because, as we have repeatedly said, the application of the Act depends upon the character of the employee's activities."

This Court's decision in the *Kirschbaum-Arsenal* cases, *supra*, held within the Act employes of loft buildings who never left the state and whose employer's business was nominally intrastate, but who were engaged in rendering necessary service to tenants who were in turn engaged in production of goods for commerce. The Circuit Court below discarded and utterly set aside the holdings of this Court when it stated:

> "Notwithstanding some more or less remote approaches to the present problem in *Kirschbaum v. Walling*, 316 U. S. 517, and *Warren Bradshaw v. Hall*, 317 U. S. 88, it is impossible for us to entertain the concept that window washing becomes interstate commerce or is in the pursuance of the production of goods for interstate commerce, by the fact that the windows cleaned are in the manufac-

> turing establishments of industries engaged in interstate commerce * * *." (R. 33.)

During oral argument petitioner's counsel undertook to cite authorities on business management to demonstrate that window cleaning is necessary to any business enterprise that has windows. The court observed that the citation of such authorities was wholly unnecessary since judicial notice would be taken of that fact. The court acknowledged therefore that petitioners are *engaged in an occupation necessary to the production of goods for commerce*, yet held the Supreme Court's *Kirschbaum* decision to be "remote" in spite of the admitted fact that petitioners' function is to provide natural light and clean windows, whereas in the *Kirschbaum* case employes held to be under the Act provided artificial light and cleaned the floors.

There is yet another particular in which the courts below failed to follow decisions of this Court. Even if it be assumed that respondent is a "service establishment," this type of servicing has been held not to be "in intrastate commerce" within the meaning of the exemption. In the *Kirschbaum-Arsenal* cases, *supra*, the Court held that similar maintenance employes of a loft building company serving producers of goods for commerce within the building were engaged in production of goods for commerce, and therefore did not come under the Section 13 (a) (2) exemption because "in any event 'the greater part' of the 'servicing' done by the petitioner here [the loft building company] is not in intrastate commerce."

This holding was confirmed in *McLeod v. Threlkeld*, 319 U. S. 491, where the Court stated:

> "The contention that the work of the employes is covered by the exemption of 13 (a) (2) seems with-

out significance. *If the work is in interstate commerce, the exemption does not apply.*" (Emphasis supplied.)

Here, the stipulated facts show that the greater part of petitioners' work was performed for producers of goods for commerce and was therefore not "servicing in intrastate commerce" within the meaning of the exemption. Hence, under this Court's holding in the *McLeod* case petitioners should recover.

The very fact that petitioners are engaged in an occupation which, by virtue of Section 3 (j) *supra* is an element in the production of goods for commerce under the act (see *Kirschbaum v. Walling, supra, Walton v. Southern Package Corp.*, 320 U. S. 540, *Walling v. Soudock*, 132 Fed. 2nd 77 (CCA-5) cert. denied 318 U. S. 772) is sufficient to dispose of respondent's contention that it is a "service establishment" within the meaning of Section 13 (a) (2). Even if we assume that respondent is indeed a "service establishment", the exemption cannot apply because the "greater part" of its "servicing" is admittedly in interstate commerce.

II.

CONFLICT BETWEEN THE DECISION BELOW AND DECISIONS IN OTHER CIRCUITS

A. Conflict With the Second Circuit

When the Arsenal case was appealed to the Second Circuit that court expressly rejected the service establishment defense, saying that the term "service establishment" should perhaps

> "* * * be limited to those serving consumers directly, like tailors, or garages, or laundries; the juxtaposition of retail selling and servicing does indeed suggest as much." *Fleming v. Arsenal*, 125 Fed. (2nd) 278.

That decision was affirmed by this Court in 316 U. S. 517. In the case at bar the lower court adhered to its rationalization in *Lonas v. National Linen Service Corp.* 136 Fed. 2nd 433, cert. denied 320 U. S. 785. For reasons discussed on p. 19, we believe that the *Lonas* case presents a factual pattern at complete variance with the facts at bar and accordingly is not here binding. We submit, however, that the *Lonas* decision is in diametrical conflict with the position expressed by the Second Circuit in the *Arsenal* case, and is likewise in conflict with other circuits, as discussed *infra*. The court below held in the *Lonas* case, as quoted by the district judge in dismissing the case at bar (R. 23):

> "The administrator * * * contends that the exemptions in paragraph 13 (a) (2) are limited to establishments retail in character whether they sell goods or services. This view is based on what he conceives to be the implications to be drawn from the legislative history of the Act and the grammatical construction of the exemption section. Since the related terms 'retail' and 'service' both modifying the word 'establishment' they refer to employers who deal directly with private consumers as distinguished from commercial and industrial customers. In other words, the service establishment exemption extends only to those establishments having the characteristics of retail stores * * *.
>
> "We find no support for this interpretation in the language of the exemption section. * * *"

We are aware that certiorari was denied by this Court in the *Lonas* case. It may be noted, however, that since that denial* the Fourth Circuit has twice taken a position op-

*No inference may be drawn from the denial. As this Court held in *U. S. v. Carver*, 260 U. S. 482, quoted in *Atlantic Coast Line Railroad Co. v. Poyce*, 283 U. S. 401: "But the denial of a Writ of Certiorari imports no expression of opinion upon the merits of the case, as the Bar has been told many times."

posite to that above quoted, in *Guess v. Montague*, 140 Fed. (2nd) 500 and *Walling v. Roland Electrical Co.*, decided Jan. 3, 1945, and not yet in pamphlet form, both of which are discussed later on.

The conflict between the circuits is emphasized by the decision of District Judge Rifkind (Southern District of New York) in *Phillips v. Star Overall Dry Cleaning Co.*, 55 F. Supp. 238, which held the *Lonas* theory inapplicable on the ground that it was in conflict with the *Arsenal* (CCA-2) *Kirschbaum* (CCA-3) and *Guess* (CCA-4) cases.

The petitioners here present a stipulated fact which takes them outside the *Lonas* case entirely, namely, that they are not ENGAGED IN a "service establishment"; that if respondent is indeed a service establishment, petitioners are employed by it, but *engaged in* factories which produce goods for interstate commerce. This point is discussed in greater detail below.

The Courts below seemed concerned that the relationship of petitioners' work to commerce is remote. However, in *Borella v. Borden Co.*, decided July 28, 1944, by the Second Circuit, certiorari applied for Nov. 16, 1944, that court held covered by the act workers twice removed from the actual physical production of goods.

There maintenance workers were employed in doing maintenance work on a building owned by their employer which was occupied by the executive and administrative employes of the company. In the casual meaning of the word, these maintenance employes were farther removed from "production" than petitioners here. Neither they nor the occupants of the building came into physical contact with the goods at any stage of their production. Since, however, they were "necessary to the production", they were held covered by the act. This decision, which

cannot be reconciled with the decision below, should in and of itself provide sufficient reason for the granting of the writ here sought.

The Circuit Court of Appeals for the Second Circuit has reaffirmed its position in the recent case of *Fleming v. Post* decided December 14, 1944, and reported in 9 Labor Cases 62,450. In this case the Court said:

> "That maintenance employees of a building in which tenants are engaged in the manufacture of goods for interstate commerce are within the Act is too well established for dispute."

And the Court said:

> "In determining whether a substantial portion of the building is occupied by tenants engaged in the production of goods for interstate commerce, we have adopted the measure of 20% suggested by the Administrator. See *Callus v. 10 East 40th Street Building, Inc.* (CCA-2 December 12, 1944), 9 Labor Cases 62,445."

The results so reached are directly opposed to the position taken by the courts below in the present case.

B. Conflict with the Third Circuit

In *Kirschbaum v. Walling*, 124 Fed. 2nd 567, the Third Circuit held:

> "* * * By 'service establishment' Congress intended that type of establishment which has the ordinary characteristics of a retail establishment except that it sells services instead of goods."

This decision was likewise affirmed by this Court 316 U. S. 517. And patently, if the Third Circuit was correct there, the Sixth Circuit was incorrect in taking the opposite view in the *Lonas* case and in the case at bar.

C. Conflict with the Fourth Circuit

Subsequent to the handing down of the *Lonas* decision in the Sixth Circuit, the Fourth Circuit was called upon to decide a similar question in *Guess v. Montague,* 140 Fed. 2nd 500. It deliberately chose to follow the Second and Third Circuits and disregarded the Sixth when it held:

> "On the principle *noscitur a sociis* the service establishment contemplated by the exemption must be the same sort as a retail establishment * * * that is, it must be one selling services to consumers. The exemption does not extend to manufacturing or processing goods for sale, or to production within the meaning of Sec. 3 (j)."

And if any doubt were to remain that the decisions below conflicts with the position of the Fourth Circuit, that doubt would be completely removed by that court's disposition of *Walling v. Roland Electrical Co.,* reversing the District Court's dismissal of the complaint on the *Lonas-Martino* theory. The reasoning of the Fourth Circuit here is clearly inconsistent with that of the Sixth Circuit on all of the principal points involved in the two cases:

1. The court held that employes of a concern, the greater part of whose business consisted in the repair, rebuilding, and reconditioning of motors and in the installation, relocation, extension and repair of electrical wiring used in the production of goods for interstate commerce, were engaged in the production of goods for commerce within the meaning of the act.

2. The court held that such a concern is not a service establishment within the meaning of Sec. 13 (a) (2). And while it might be argued that the repair of machinery is more "necessary" to production

than the maintenance of natural illumination through the cleaning of windows, the Fourth Circuit's reasoning clearly applies to the case at bar and is inconsistent with that of the Sixth Circuit.

3. The court held that the company was not a "retail or service establishment within the meaning of the act" since "the labor of its employees was performed almost altogether in rendering service to commercial and industrial concerns, where the cost of the service would not be absorbed by the one to whom they were rendered but would be passed on as a part of the price of the product."

4. Finally, the court held that "even if the company could be held to be a service establishment within the meaning of this exemption, the greater part of its servicing was not in intrastate commerce, but in the production of goods for interstate commerce, and the exemption did not apply to it for that reason." Judge Parker quoted at length from Judge Learned Hand's opinion in *Fleming v. Arsenal Building Corp.*, 125 Fed. (2nd) 278, and relied on this Court's decisions in *Kirschbaum v. Walling* and *McLeod v. Threlkeld*. Since petitioners are likewise engaged in the production of goods for commerce, the *Roland Electrical* decision is squarely contrary to the decision of the lower courts in the case at bar.

Indeed, the conflict was pointed up by the court itself when it observed, "* * * **if these decisions**—*Lonas* and *Martino*—**are accepted as sound law**, we think they are clearly distinguishable from the case at bar in that the services here were more clearly in furtherance of the production of goods for commerce and the establishment is more clearly not a retail or service establishment within

the meaning of the act." (Emphasis supplied.) On the other hand, this Court, in *Armour & Co. v. Wantock*, ... U. S. .... (decided Dec. 4, 1944) declined to give an "unwarranted rigidity to the application of the word 'necessary' which has always been recognized as a word to be harmonized with its context. See *McCulloch v. Maryland*, 4 Wheat. 316, 413, 414."

D. Conflict With the Fifth Circuit

The Fifth Circuit was called upon to decide a question almost identical with that presented in the case at bar in *Sondock v. Walling*, 132 Fed. (2nd) 77, cert. denied 318 U. S. 772. The only factual difference was that there the employes in question were plant guards, while here they are window cleaners. In both cases they were employed by outside contractors who assigned them to render their respective services to industrial plants in which goods were produced for interstate commerce. In neither case did any of the parties cross state lines and in neither case did any of the parties actually handle any of the goods produced. If there is a difference, it is that in the case at bar a greater portion of the work was rendered in buildings in which goods were produced for commerce, whereas in the *Sondock* case only a "substantial" amount of such work was shown. The sole claim to coverage in both cases was that, regardless of the character of the employer's business, the occupations in which the employes were engaged were necessary to the production of goods for commerce. Yet, opposite results were arrived at by the respective circuits.

E. Conflict With the Ninth Circuit

The lower court also conflicts with the decision of the Ninth Circuit in *Consolidated Timber Co. v. Womack*, 132

Fed. (2nd) 101, where coverage was granted to employes whose sole relation to commerce was that they cooked for lumberjacks in a lumber camp. In disposing of the service establishment defense, the court held:

> "* * * It here occurs to us that perhaps it may not truthfully be said that the greater part of the servicing of either cookhouse was in intrastate commerce. Was not the greater number of diners at the cookhouse engaged in the production of goods for commerce? Were not the cookhouses an integral part of an organization devoted to the production of goods for commerce? Does it not follow logically and reasonably, that the greater part of the service rendered by the cookhouse was in interstate commerce rather than intrastate?"

III.

IMPORTANCE OF THE QUESTIONS PRESENTED

Viewed on a nation-wide basis, the number of employes effected by this decision runs into many thousands. The issue here involves more than merely window cleaners. It involves an infinite number of workers whose activities are necessary to the production of goods for commerce, but whose pay checks are signed by an independent contractor. The courts below having accepted, by judicial notice, the proposition that petitioners' work is necessary, the question is whether respondent and a multitude of similarly situated employers are to succeed, as respondent has thus far succeeded, in using Section 13 (a) (2) of the act as a barrier behind which they may pollute the channels of commerce with goods produced on sub-standard wages.

In view of the conflict between the circuits no one knows presently whether such employes are within or without

the act. On Oct. 18, 1944, the Sixth Circuit tells us that window washers are out. Nine days later a District Court in Chicago tells us that they are in. *Bittner v. Chicago Daily News Printing Co.*, 7 Wage Hour Reporter 1123. The arena of industrial competition is the entire nation. Our unions are nation-wide and the pattern of collective bargaining is national. Yet we have one Federal law in Detroit and an entirely opposite Federal law in Chicago. How, unless the Supreme Court grants certiorari and tells the Nation which is and which is not the law, are both labor and management to make proper plans? How are they to know their respective rights and obligations?

As matters now stand both parties to the collective bargaining process must be burdened with well justified doubts as to the applicable law. Honest and law-abiding employers must be plagued with uncertainty lest on the one hand they accept a law which may not apply to their business and thereby increase their operating costs, or whether they proceed on the assumption that the act does not apply and face the possibility of Sec. 16 (b) suits later on.

The well being of the building maintenance industry requires that the Nation be told by the highest court in the land what the applicable law really is.

IV.

THE DECISION BELOW IS ERRONEOUS

The courts below entirely disregard the statutory requirement that before a defendant may be exempted as a service establishment "he must affirmatively prove that in addition to being a service establishment, the greater part of the servicing of the defendant is in intrastate com-

merce. *Fleming v. Hawkeye Pearl Button Co.*, 113 Fed. (2nd) 52, 56 (CCA-8), *Consolidated Timber Co. v. Womack*, 132 Fed. (2nd) 101, 106 (CCA-9). The act being remedial, all employers who claim exemptions "must bring themselves within both the letter and the spirit of the exemptions since they are subject to strict construction." *Bowie v. Gonzales*, 117 Fed. (2nd) 11, 16 (CCA-1; *Piedmont & Northern Ry. v. Interstate Commerce Comm.*, 286 U. S. 289, 311; *Fleming v. Palmer*, 123 Fed. (2nd) 749, 762 (CCA-1).

Despite the foregoing requirement, the record here contains an unequivocal stipulation that the greater part of the work done by defendant corporation was for customers engaged in interstate commerce AND ALSO that *the greater part of the work done by defendant corporation was for customers engaged in THE PRODUCTION OF GOODS FOR INTERSTATE COMMERCE.* R. 18-19.

Respondent has not sustained the burden of establishing the exemption. The record is absolutely barren of any intrastate servicing whatever. The *Lonas* case, on the basis of which the courts below dismissed the complaint in the case at bar, decided only two specific questions, first, that *a service establishment does not alter in character because its customers are industrial concerns rather than private consumers.* In the *Lonas* case the court based its findings on the pleaded facts when it said:

> "The court dismissed the complaint on the ground that the pleaded facts, accepted as true, show that defendant is a service establishment the greater part of whose servicing is in intrastate commerce, and sections 6 and 7 of the Act therefore have no application to its employes."

It should be noted that the court accepted as true that the defendant in the *Lonas* case was a service establish-

ment, "the greater part of whose servicing is in intrastate commerce." Here the opposite fact is true.

The second and primary holding in the *Lonas* case was to reject the Administrator's argument that the exemption in Sec. 13 (a) (2) is limited to establishments retail in character, whether they sell goods or services, and as the court there said,

> "In other words (so claims the Administrator) the service establishment exemption extends only to those establishments having the characteristics of retail stores, and the defendant's business is not a retail service establishment because 60% of its customers are industrial or business concerns.
>
> "We find no support for this interpretation in the language of the exemption section."

In other words, the court held that the exemption applies to one who sells its services to large industrial concerns alone and it is still a retail establishment even if it does not sell its services to the general public. Thus, the *Lonas* case merely defined what is a service establishment.

Even if the foregoing is a correct interpretation of Congressional intent, the facts at bar bear little similarity to those in the *Lonas* case. Here the record shows that the greater portion of the work was done for factories which were engaged in the production of goods for commerce. The Lonas record showed 60% of the work rendered for "industrial or business establishments" and the court accepted as true that "the pleaded facts show that defendant is a service establishment the greater part of whose servicing was in intrastate commerce."

In the case at bar the attitude of the District Court and of the Circuit Court in affirming the former's decision without opinion is based on a misapprehension as to the

intention of Congress in writing Sec. 13 (a) (2) into the act. This Court has already defined that detail of Congressional intent in *Walling v. Jacksonville Paper Co.*, 317, U. S. 564 at 571:

> "It is quite clear that the exemption in Section 13 (a) (2) was added to eliminate those retailers located near the state lines and making some interstate sales."

The decision below goes beyond this intent. It broadens the scope of the exemption by:

1. Extending it to cover establishments whose servicing is rendered to industrial concerns, rather than to private consumers, as indicated by the juxtaposition of the words "retail or service" in the exemption section.

2. Extending it to cover an establishment the greater part of whose "servicing" (if indeed respondent's work is "servicing" within the exemption) is rendered for factories engaged in the production of goods for commerce.

3. Effectually reading out of the exemption section the modifying words "the greater part of whose selling or servicing is in intrastate commerce".

We submit that the lower court has hardly complied with the canon of construction of remedial legislation which requires liberal interpretation as to coverage and strict interpretation as to exemptions. Thus in *Bowie v. Gonzales*, 117 Fed. (2nd) 11, the First Circuit held:

> "Being a remedial statute, the appellants must bring themselves within both the spirit and the letter of the exemptions, since they are subject to strict construction."

So also the Eighth Circuit in *Fleming v. Hawkeye Pearl Button Co.*, 113 Fed. (2nd) 52, in which that circuit quoted this Court in support of its giving liberal construction to the Act:

> "Sec. 13 (a) (5) creates an exemption to the general scope of the Act and hence is subject to strict construction. In *U. S. v. Dickson*, 10 L. Ed. 689, it is said 'In short, a proviso carves special exemptions only out of the enacting clause; and those who set up any exemptions must establish it as being within the words as well as the reason thereof.' "

In the lower court's disposition of the case at bar the opposite position was taken. Much less than giving the exemption section strict interpretation, the court interpreted the language "*engaged in* any retail or service establishment" to mean "*employed by* any retail or service establishment". The stipulated facts (R. 10-11) show that petitioners, although EMPLOYED BY respondent, were not ENGAGED IN respondent's establishment, but in the establishments of respondent's customers such as General Motors factories which admittedly can hardly be called "service establishments". The decision therefore either broadens the exemption by construing the words "engaged in" to mean "employed by", or in the alternative, hypothecates the fiction that respondent's "establishment" includes not only its own place of business, but the places of business of its customers, a position that is utterly without substantiation in the record. Whichever was the court's rationale, the error is reversible.

V.

THE DECISION BELOW CONFLICTS WITH THE INTERPRETATIVE BULLETIN OF THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION

Although we do not contend that the opinions of the Administrator of the Wage and Hour Division are the law, this Court has repeatedly said that the interpretative bulletins of the Administrator are entitled to great weight. *U. S. v. American Trucking Associations*, 310 U. S. 534. More recently, this Court, speaking through Mr. Justice Jackson in *Skidmore et al. v. Swift & Co.* on Dec. 4, 1944, held:

> "We consider that the rulings, interpretations, and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, to constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier pronouncements, and all those factors which give it power to persuade, if lacking power to control."

Prior to argument the Administrator petitioned the Circuit Court below for and was granted leave to submit a brief *amicus curiae*. Here the Administrator expressed a position almost identical with that taken by petitioner in which he urged that the District Court's decision be reversed with direction to enter judgment for petitioner. Much less than consider and dispose of this position, the Circuit Court below did not as much as acknowledge that a brief *amicus* has been filed. From the fact that no opinion was written and from the extreme brevity of the

order affirming the District Court's decision, we are constrained to suggest that no weight whatever was given to the Administrator's position.

In Section 27 of Interpretative Bulletin No. 6 we find

> "* * * establishments which perform a substantial amount of work for industrial or business users, government agencies, institutions, and similar customers may not be considered service establishments. A service establishment is one which performs service for private individuals for personal or family use."

and in Section 23:

> "* * * Service establishments are usually local in character, are usually open to the general consuming public and usually render a service to private individuals for direct consumption. The service is usually rendered in small quantities for private use rather than for industrial and business purposes. Further, the service is usually rendered at a 'retail' price."

Section 24 gives a number of typical examples of service establishments and then goes on to say

> "* * * These establishments operate in the same manner as retail establishments and have substantially the same attributes. The principal difference is that their revenue is derived primarily from the sale of service instead of from the sale of merchandise."

The foregoing interpretations have found support in decisions in several of the circuits. *Fleming v. Arsenal,* 125 Fed. (2nd) 278 (CCA-2), *Kirschbaum v. Walling,* 124 Fed. (2nd) 567 (CCA-3), *Guess v. Montague,* 140 Fed. (2nd) 500 (CCA-4), *Sondock v. Walling,* 132 Fed. (2nd) 77 (CCA-5), cert. denied 318 U. S. 772, and *Consolidated Timber Co. v. Womack,* 132 Fed. (2nd) 101 (CCA-7).

On the other hand the decisions of the Sixth Circuit in the *Lonas* case *supra* and in the case at bar reject the

administrator's interpretations and are in direct conflict with the foregoing authorities. It therefore follows that not only must the public face confusion as to the applicable law, but in addition, the Administrator of the Wage and Hour Division must be handicapped in the fulfillment of the task entrusted to him by Congress in enforcing the act. As our 48 States are one Federal Union, we should have one Federal law, applicable in all the circuits.

CONCLUSION

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

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